The Supreme Court as a Cheerleader in Politico-Moral Disputes

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This address explores the Supreme Court's involvement in the nation's politico-moral disputes. The Court sometimes injects itself into these disputes and through *dicta* and other inspirational activities becomes a cheerleader for one side. I consider the effectiveness of the Court's cheerleading in inspiring change in national policy following *Roe v. Wade* (1973) and *Brown v. Board* (1954), finding that judicial cheerleading was much more effective for achieving a consensus about desegregation than for achieving one about abortion rights. I conclude by arguing that the Court's cheerleading: (1) has the capacity to bring politico-moral issues to the front burner, (2) is more effective in supporting change rather than in defending the status quo, (3) does not frighten or shame the losing side into abandoning its cause, often having the opposite effect, and (4) must persuade the uncommitted within a decade if its cause is to be successful.

Since the 1950s there has been considerable scholarly argument about the importance of the Supreme Court in the process of resolving major issues of domestic policy. Beginning with Dahl's (1957) seminal work, a number of scholars (McCloskey 1960; Adamany 1973; Nagel 1965; and Funston 1975) have argued that, compared to actions by the president or Congress, Supreme Court decisions are of secondary significance in the development of major, long-run policy. However, Casper's (1976) pointed rebuttal of Dahl (see also Handberg and Hill 1980; Lasser 1988) argued that the Court is a primary actor in shaping important national policy.

Controversial major domestic policy issues largely fall within three categories. The most frequent and pervasive disputes involve economic policies. Since the Jacksonian era, actual or proposed government policies that influence or regulate economic activity have triggered major philosophical, sectional, and class conflict. The Supreme Court participated in economic disputes most persistently and visibly from around 1890 until its famous confrontation with the New Deal in the mid-1930s; otherwise, its involvement has been sporadic. Disputes about the extent of civil liberties—first

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amendment guarantees, rights of the accused, and equal protection of the laws questions—constitute a second category. These disputes have become a regular part of national philosophical debate and political rhetoric over the last half century. The Supreme Court is deeply involved in them; indeed, its decisions have generated many of the disputes.

Moral disputes which spill over into the political arena constitute the third category. Politico-moral disputes, as I will term them, can have economic or civil libertarian components, but their essence is that the disputants approach policy questions not in terms of political wisdom or experience, but in nonpolitical terms of absolute right and wrong. Clashes over politico-moral issues are more emotionally intense than are those in the other categories. The Supreme Court is often although not always involved in their resolution.

I

This address explores the Supreme Court's involvement in politico-moral clashes, particularly its ability to guide or push such disputes to a particular resolution or consensus through its actions. There is considerable literature about how the Supreme Court functions in disputes over national policy, but virtually none of it focuses on the Court in the context of politico-moral disputes. These disputes, although uncommon, are among the most important ones and deserve separate analytical and theoretical attention.

Our national history has been marked by some intense and bitter moral differences that have flared into political disputes about what behavior is appropriate for the federal government to control. One and perhaps both sides see the issue through moral eyes. In these eyes, the question is not what policy is rationally best for the commonweal, or even what policy will favor their own economic interests. Rather, the question is what does the Bible command, or what does natural law or abstract moral justice or some other standard require. Fortunately for our country's stability, national politico-moral clashes are uncommon. But when they occur, it is no longer politics as usual. Indeed, by their nature they are often the cross-cutting issues that help produce partisan realignment in America (Carmines and Stimson 1986; Sundquist 1983; Lipset 1960, chap. 11).

The concept of a politico-moral issue is reasonably clear, but just which disputes fall within the concept can be less certain. To my mind, clashes over slavery and abortion lie at its core. One side holds fervently to a conviction that these practices are morally unacceptable in an absolute sense. This principle cannot be compromised under any circumstances. Slightly away from the core, there are some other issues which have a strong moral component, but can be given to some compromise. Desegregation falls here; its opponents might grudgingly accept its legality, but can continue to oppose any

widespread implementation. Likewise its proponents can be as one in rejecting "separate but equal," but they might not agree on how extensively desegregation should be implemented. Prayer in public schools is also somewhat away from the core; there is room for compromise between state mandated specific prayers and no schoolhouse acknowledgment of religion in any manner. Further away from the core, politico-moral issues can be located in a boundary area with economic or civil liberties issues. Child labor laws fit here. Arguably, so might minimum wage/maximum hours laws, affirmative action programs, and aid to religious schools.[1]

Not all politico-moral questions wind up in the judicial arena. Prohibition, for example, had no judicial impetus and the Supreme Court was not involved in the fray. But most such questions do garner some Supreme Court involvement and for many the Court is a major participant (e.g., child labor, prayers in public schools, desegregation, and abortion). Tocqueville's observation that in the United States political questions sooner or later became judicial questions applies in good measure to politico-moral questions as well as to others.

Politico-moral disputes over public policy are in many ways analogous to a zero-sum game. This game is often used to explain behavior and outcomes in a certain type of decisional situation. This game can have only two sides.[2] A finite and unchangeable amount of resources are at stake. Whatever one side wins, it gains from the other side, and vice-versa. In other words, one side's gain is the other's loss, so that the total sum of the exchange equals zero. Unlike many other decisional games, in a zero sum game no agreement or compromise is possible that will advantage both sides.

Like the zero sum game, politico-moral disputes over public policy involve two identifiable sides. They are virtually 180 degrees apart and completely antagonistic toward each other. One side's moral right can be the other's moral wrong. Like scorpions in a bottle, each is drawn to battle, each pursues total victory. Compromising principles and accommodating the other side's interest is morally unacceptable. If done, it is but a temporary truce based upon necessity. The war goes on.

As any politician can tell you, compromise and accommodation are the name of the American political game. Constantly facing reelection and having to work in a logrolling milieu, career politicians dislike alienating voters or colleagues. Thus they often avoid the zero sum game situation by adding new resources to the pot to keep the competing interests reasonably

[1] Even core issues can have a strong economic component. Southerners often defended slavery on the principle of states' rights, but the motivation to do so would have been much weaker in the absence of slavery's economic benefits. Abolitionists, however, had no economic interest in freeing the slaves and were actuated by conscience.

[2] I use the term sides rather than players because the latter suggests that a single entity adopts goals and directs strategy.

satisfied. When additions are impossible, symbolic reassurances are offered all around (Edelman 1964). But additional resources or symbolic reassurances are largely irrelevant or even dysfunctional in politico-moral conflicts. To at least one side, and perhaps both, the dispute is not about the allocation of resources, it is about controlling behavior. Moreover, the dispute is about symbols as much as substance; using them to assuage one side can arouse hostile emotions in the other side.

Zero sum policy situations make career politicians very uncomfortable. They cannot satisfy both sides and, if they try, they are likely to end up alienating both. If they favor one side intensely, their fervor can make interaction with other politicians unpleasant and may undermine their ability to bring home the pork; moreover, a hard line stance is quite likely to mobilize votes for an opposing candidate. Thus, when politico-moral issues loom large on the policy landscape, politicians can be quite willing to duck. Why not let the Supreme Court—that group of nine that never has to face the voters or bring any pork home—make the hard, decisive choice?

Courts are used to zero sum games. They are inherent in the nature of our common law adversary system. It is quite natural for judges to approach a case with a winner-take-all mentality. Thus, judges do not normally see themselves as developers or brokers of compromise. The Supreme Court may ratify bargains shaped elsewhere, and occasionally it will develop compromises to satisfy its own internal divisions, (e.g., *University of California v. Bakke*, 438 U.S. 265, 1978), but normally when an important issue is starkly posed, the Court responds black or white, up or down. This tendency is even more pronounced in politico-moral cases where each side wants it all. In these cases, there is usually no political bargain to ratify because politicians have left the matter unresolved. The Court may be asked to initiate a politico-moral policy with virtually no guidance from Congress, the president, or even the states, and may respond by giving a sweeping victory to one side.

A Supreme Court victory does not end the game. The losing side is down, but not necessarily out. It returns to the Court, seeking to limit the precedent's scope with the eventual hope of overturning it altogether. The winner asks the Court to press on, to buttress or build on the precedent with the hope of sweeping the losing position into the political and judicial history books. Now the political branches cannot avoid being drawn into the game. Each side demands helpful legislation or administrative policies from the federal and state governments. Single-issue politics rises; many previously inactive citizens are mobilized by the Court's decision. Their political activity may shape the outcome of electoral contests. These outcomes, in turn, may affect who is considered for vacancies on the Supreme Court. A differently composed Court can be less supportive of the earlier Court's politico-moral policy choice. In short, the politico-moral, zero sum game is played in

several arenas, perhaps for decades, and ends only when one side has been so thoroughly defeated that it becomes too politically impotent to continue. Once the Supreme Court is involved, it remains one of these arenas.

II

When the Court makes decisions affecting public policy, it often goes beyond deciding who wins and explaining why in terms of precedent or logic. At times the Court takes a position because it believes that position represents the best public policy in terms of broad values that the justices hold dear. Its opinion argues for the policy, sometimes passionately. In doing this, the Court becomes "an educational body"; the justices become "teachers in a vital national seminar" (Rostow 1952, 208). The Court tries to win adherents to its preferred policy and to persuade people to reject that of the losing side. When the Court does this, it engages in what I will term "cheerleading" activity. Cheerleaders try to mobilize spectators as well as participants. Judicial cheerleading is quite likely to occur when politico-moral disputes reach the high Court. Such disputes are prone to arousing passion in everyone, including judges. Moreover, in order to prevail, the Court knows it must persuade the uncommitted and perhaps some opponents as well.[3]

Through cheerleading, the Court has the potential to influence the development of policy more broadly than it can through its direct policymaking. Its cheers may gain media attention, shape the public's understanding of an issue, arouse and mobilize popular sentiment, activate interest groups, and sooner or later cause other political institutions to make particular policies that the Court itself cannot make. Indeed, because few major issues can be settled by the judiciary alone, the Court may frequently feel impelled to cheerlead, especially in politico-moral disputes. However, it is rather uncertain how well the Court fulfills its cheerleading potential. Considerable evidence indicates that the Court has at best a very limited positive impact on public opinion (e.g., Rosenberg 1991; Franklin and Kosaki 1989; Marshall 1987). Likewise, its decisions do not particularly generate heightened respect among policymakers (e.g., Schmidhauser and Berg 1972; Scigliano 1971; Murphy 1962). Further, in politico-moral issues as compared to economic or civil libertarian ones where positions are held less intensely, we would expect judicial cheerleading to encounter stiffer resistance.

Much judicial cheerleading is deliberate. Deliberate cheers are found in

[3] The justices, of course, are often divided in deciding cases. Concurring and dissenting justices may do a much better job of cheerleading than the majority does. Holmes's dissent in *Abrams v. U.S.* (250 U.S. 616, 1919) and Brandeis's dissent in *Olmstead v. U.S.* (277 U.S. 438, 1928) live today while both the authors of and the opinions for the Court in those cases have long been forgotten. In this address, however, I look only at the opinions of the Court in discussing judicial cheerleading.

dicta—that portion of an opinion not necessary to its rationale. In *dicta*, the Court may suggest action by Congress (e.g., *Bell v. Maryland* [378 U.S. 266, 1964], a few months before passage of the 1964 Civil Rights Act), question the viability of a doctrine or prior holding (e.g., *Webster v. Reproductive Health Services of Missouri* [106 L. Ed. 2nd 410, 1989], casting doubt on abortion as a fundamental right), or invite further litigation (e.g., *Webster*). Unlike the pep squads at football games, however, judicial cheerleaders can also belittle their opponents through negative cheerleading—or what I will call boos and hisses. The Court boos and hisses when it writes *dicta* aimed at discouraging further litigation or legislative challenges to its decisions. The Court did this, for example, in a strong reaffirmation of the right to abortion in the 1983 *Akron* case (*City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416).

Not all judicial cheerleading is deliberate. The substance of certain decisions, without benefit of elaborating *dicta*, can boost or depress morale and mobilize citizens, interest groups, legislatures, and other government agencies to new political activity without the Court particularly intending such a result. For instance, decisions such as *Reed v. Reed* (404 U.S. 71, 1971) and *Craig v. Boren* (429 U.S. 190, 1976), although written dispassionately, gave considerable comfort to the women's movement. All major Court decisions have just this potential and the justices cannot help but realize it. Indeed, at times the Court may try to proceed cautiously in its extrajudicial influence. Certainly, for example, the Court was a restrained cheerleader at best in *Brown v. Board of Education* (347 U.S. 483, 1954) when it put off a final decree for a year and then announced an ambiguous policy of "all deliberate speed" (*Brown v. Board of Education II*, 349 U.S. 294: 301, 1955). Clearly the justices saw *Brown*'s potential for mobilizing intense political activity on both sides and did not want to encourage this (Kluger 1976, 679).

III

In this section, I will look at the Supreme Court's involvement in two politico-moral controversies: abortion and desegregation. I study them because they are core or near-core politico-moral clashes and because, unlike slavery,[4] the Court is or was heavily involved in these two clashes. I focus on the Court's cheers, its boos and hisses, and to whom they were directed. In the next section, I examine the effect of the Court's cheerleading activity on the outcomes of these politico-moral disputes—that is, what the Court's cheers accomplished. In the closing section, I offer some preliminary hypotheses about the Court's role as a cheerleader in politico-moral disputes.

[4] Chief Justice Roger Taney's opinion for the Court in *Dred Scott* (*Scott v. Sandford*, 19 How. 393, 1857) was certainly one of the Supreme Court's all-time great cheerleading performances. However, it was the Court's only significant venture into the dispute over slavery.

Roe v. Wade (410 U.S. 113, 1973), coming virtually out of the judicial blue, established a major new national policy and did so without consideration or guidance from other institutions. It is the classic example of a sweeping policy decision initiated and imposed on the nation by the high Court. Throughout the 1970s and well into the 1980s, the Supreme Court, except for the public financing cases (*Maher v. Roe*, 432 U.S. 464, 1977; *Harris v. McRae*, 448 U.S. 297, 1980), encouraged a broad and uncomplicated access to abortion. Its decisions fended off spousal permission requirements (*Planned Parenthood v. Danforth*, 428 U.S. 52, 1976), parental permission laws lacking a judicial "bypass" (*Danforth*), a requirement of judicial approval before a minor could obtain an abortion (*Bellotti v. Baird* (443 U.S. 622, 1979), a hospitalization requirement (*Sendak v. Arnold*, 429 U.S. 968, 1976), bans on certain methods of abortion (*Danforth*), criminal penalties for not attempting to save the fetus after 20 weeks (*Colautti v. Franklin*, 439 U.S. 379, 1978), waiting periods (*City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416, 1983), and the like. In *dicta* in *Akron*, the Court took explicit pains to reaffirm its commitment to abortion rights against the Solicitor General's request that *Roe* be reconsidered. Three years later in *Thornburgh v. American College of Obstetricians and Gynecologists*, (476 U.S. 747, 1986) the Court once again made it a point to reaffirm *Roe*, this time in the face of a Reagan administration brief urging that *Roe* be overruled.

With the replacements of Chief Justice Warren Burger and Justice Lewis Powell in 1986 and 1987 by Justices Antonin Scalia and Anthony Kennedy respectively, the Court's pro-choice majority disappeared. The Court stopped booing and hissing the pro-life forces and began responding more positively to their challenges. This was seen most dramatically in the 1989 case of *Webster v. Reproductive Health Services* (106 L. Ed. 2nd 410, 1989) where the Court by a 5–4 vote upheld a Missouri law declaring that life begins at conception,[5] banning the use of state funds to encourage or counsel abortion, and imposing a viability test on fetuses thought to have been carried 20 weeks or more. In the 1990 case of *Hodgson v. Minnesota* (111 L. Ed. 2nd 344), the Court upheld a two parent notice requirement when feasible, even when only one parent had custody of the girl. And in 1991 the Court upheld a federal administrative regulation prohibiting family planning centers which received any federal funds from counseling clients about abortion or even merely mentioning it as an option (*Rust v. Sullivan*, 114 L. Ed. 2nd 233).

What is the importance of *Webster*, *Hodgson*, and *Rust*? They have, of course, some substantive impact; each somewhat diminishes the ease with

[5] The Court did not directly uphold the declaration that life begins at conception. Instead it held that as long as *Roe* remained good law, the declaration had no practical impact on a woman's right to obtain an abortion and thus there was no need to adjudicate the constituionality of declaring that life begins at conception.

which women in certain circumstances can obtain abortion counseling or an abortion itself. But in their substance, these cases are not likely to deter women who want an abortion from getting one, nor are they likely to reduce the number of abortions very significantly. Examined closely, *Webster* changes little. The Court accorded no practical effect to begin life legally at conception. Presently, most states do not use public funds or state employees to encourage or perform abortions and *Webster* leaves those that do so free to continue. The late-term fetal viability test does pose a new obstacle. The tests are painful and can produce complications. However, the Court softened the rigidity of this provision by reading the statute to allow the exercise of some medical judgment in viability testing. Moreover, the overwhelming majority of abortions are performed well before the eleventh hour. *Hodgson*'s requirement of both parents' consent when feasible no doubt discourages some minors from having an abortion, but because the Court would not allow Minnesota to make it a *sine qua non* (requiring a judicial bypass option instead), the law differs only in degree from other states' parental consent laws which the Court had upheld for over a decade. *Rust*'s substantive impact is less clear. As an empirical matter, we do not know how much discussion of abortion occurred in federally funded clinics. Because the family planning grant program, established before *Roe v. Wade*, was based from the beginning on a philosophy of discouraging abortions, such discussions may not have been common. On the other hand, if discussion of abortion was widespread in these clinics, *Rust* may well not diminish it very much; government regulation of private conversations is a very difficult thing to enforce. *Rust* was more symbolic than substantive. Viewed as substantive policy, *Webster* and *Hodgson* as well as *Rust* were neither sweeping victories for the pro-life forces, nor crushing defeats for the pro-choice advocates.

Webster, *Hodgson*, and *Rust* become much more important, however, when we look beyond their substance. The Court as a cheerleading squad has crossed the playing field and is now shouting for the other team. *Webster* contained a clear invitation to state legislatures to see how far they could go in regulating abortion. Speaking for the Court, Chief Justice Rehnquist said that "the rigid Roe framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does" (436). He went on to say more pointedly "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability" (436). More bluntly, Justice Scalia, concurring, urged that *Roe* be overruled immediately in order to avoid the long job of dismantling it "door-jamb by door-jamb" (448). The dissenters, too, recognized *Webster*'s invitation with Justice Blackmun asserting that the majority opinion was "filled with winks and nods and knowing glances to those who would do away with *Roe* explicitly" (449) and

concluding that "the signs [of *Roe*'s demise] are evident and very ominous, and a chill wind blows" (463). To a considerable extent, judicial cheerleading is symbolic and these decisions, especially *Rust*, symbolized the Court's new values.

As with abortion, the Court had a central policy-making role in the clash of values over racial desegregation in the 1950s and 1960s.[6] Here, too, the Court brought the question to the national forefront by commanding a sweeping policy change in *Brown v. Board of Education* (387 U.S. 443, 1954). As noted above, *Brown* contained little overt cheerleading, but its very existence encouraged follow-up challenges to segregation. In several *per curiam* cases during the 1950s, the Court held segregation unconstitutional in all public facilities (e.g., *Holmes v. City of Atlanta*, 350 U.S. 879, 1955; *Gayle v. Browder*, 352 U.S. 903, 1956). While the sit-ins, freedom rides, and other demonstrations of the early 1960s did not for the most part occur in direct response to Supreme Court decisions (Rosenberg 1991, 139–55, McAdam 1982, chaps. 6 and 7), the Court encouraged such demonstrators with a string of nearly two dozen straight victories in highly publicized but doctrinally insignificant decisions.

Continued sit-ins and other demonstrative activities encouraged President Kennedy to propose and Congress to adopt the public accommodations provisions in the landmark 1964 Civil Rights Act. The Act also prohibited discrimination in employment, schools, colleges receiving federal funds, and other programs and institutions receiving federal aid or contracts. A year later, an activated Congress brought the departments of Justice and Health, Education and Welfare into the process of dismantling segregation in the hard-core resistant school systems of the Deep South. Then the Court in such major cases as *Green v. School Board of New Kent County*, (390 U.S. 430, 1968) and *Swann v. Charlotte-Mecklenberg Board of Education*, (402 U.S. 1, 1971) required school boards to take "positive steps" to obtain a desegregated system and permitted federal district judges to order cross-district busing to achieve it. By the 1970s, federal agencies as well as black interest groups were pressing hard to desegregate public schools, South and North. Further, in *Griggs v. Duke Power Co.*, (401 U.S. 424, 1971) the Court put the burden of defending educational requirements or standardized tests which differentially impacted blacks on the employer.

The Court was a cheerleader for desegregation. In *Cooper v. Aaron* (358 U.S. 1, 1958), it warned in no uncertain terms, accompanied by the unprecedented step of having all nine justices listed as authors of the opinion, that

[6] By desegregation, I mean the dismantling of de jure school desegregation and the elimination of legal or traditional modes of discrimination against blacks. I do not include disputes about affirmative action type programs in its meaning. The latter might arguably fall within the politico-moral category of disputes but is further away from its core and has a somewhat different alignment of interests on each side than did the dispute over desegregation.

violent resistance to desegregation would not be tolerated. In 1964, it warned the South that the time for all deliberate speed had run out (*Griffin v. School Board of Prince Edward County,* 377 U.S. 288). When that doctrine was formally scrapped in *Green,* the Court called for the elimination of racial segregation root and branch and charged school boards with the requirement of establishing a unitary system. Most notable, perhaps, is that from *Brown* through *Swann* and *Griggs* all of the Court's major decisions were unanimous and often consciously so (Douglas 1980, 115; Woodward and Armstrong 1979, 97; Ulmer 1971). The unanimity was a deliberate form of cheerleading. This squad did not cross the field, individually or collectively.

IV

What impact does the Court's cheerleading have in spurring and shaping the outcome of a politico-moral clash? The intended one, of course, is that the Court's cheers will serve as a catalyst to the side it favors, energizing adherents and winning converts. Likewise, its boos and hisses are supposed to discourage activity on the other side and dissuade the uncommitted from supporting it. But this is not the only possible impact, nor is it necessarily the most likely one. Another possibility is that judicial cheerleading might have an impact opposite that which was intended. Experience in both games and life tells us that the side that is down is not always out; as noted in section II, this may be particularly likely in politico-moral clashes. Defeat can mobilize the losing side and victory can make the winning side complacent.[7]

Although subject to frequent speculation, questions about the catalytic role of Supreme Court decisions have not been empirically researched. Only Rosenberg (1991) has tried to remedy this gap; he has, in fact, specifically explored the Court's ability to influence nonjudicial actors in the development of abortion and desegregation policies, among others. To assess the impact of *Roe* and *Brown,* he measured things such as newspaper, magazine, and textbook coverage of the two cases in the years following the decisions. He also relied on polls and other evidence about the salience and popular understanding of the decisions to various groups in the population. He gathered statements or memoirs of participants in subsequent activities (e.g., sit-ins, feminist organizations) about how much or little *Roe* and *Brown* had inspired them. Rosenberg found that the cases were not widely known or understood, even among those people whom they were intended to benefit. *Brown* did not seem very salient to black activists and *Roe* did little to motivate pro-choice activists. He concluded that "the evidence from [*Roe* and

[7] A third possibility which I will not discuss here is that judicial cheerleading would have no impact on either side.

Brown] makes dubious any claim for important extrajudicial effects of court action" (338).[8]

Like Rosenberg, I believe that *Roe* and the Court's post-Roe cheering did little to motivate the pro-choice forces. One reason is that *Roe* was a knockout blow leading people to believe that the game was virtually over, that cheers for the pro-choice side would be superfluous. Like spectators at a one-sided game, some pro-choice groups disbanded or shifted their energies into other women's rights causes (Epstein and Kobylka 1992, chap. 6). It is worth noting, moreover, that following *Roe* the pro-choice side never had much of a grass-roots movement. Nationally rather than locally organized, pro-choice groups relied heavily on litigation to maintain and advance the right to abortion. They were not given to mobilizing the battle in the legislative or executive branches, particularly at the state and local levels (Epstein and Kobylka 1992, chap. 6).

Roe certainly stunned the pro-life side. As with the United States after Pearl Harbor, this side had suffered a devastating blow almost before it even knew it was in a war. In fact, the very designation "pro-life" was yet to be applied to it. It took a couple of years for pro-life forces to organize, but once on their feet, they were not at all intimidated by judicial boos and hisses. Driven by a moral fervor, they assumed a Churchillian resolution to win the war, even if it took decades. Because the judiciary seemed so hostile, pro-life activists put most of their efforts into politics instead of litigation. And, although they were a minority of no more than 20% (absolutely opposed to abortion) and although public opinion about abortion has changed little since *Roe* (Tatalovich 1988), the pro-life forces were politically successful. Most important, perhaps, they were successful in getting the Republican party to link itself with their goals. However, they often influenced state and local Democratic candidates as well. Abortion policies coming from the political branches at both the state and federal levels have reflected pro-life positions much more often than not. With the Reagan Republicans ascendant nationally, attitudes about abortion soon become a key factor in the process of appointing new federal judges. The pro-lifers' political success played a major role changing the direction of the Supreme Court's cheerleading.

Thus, it appears that the Court's cheerleading in *Roe* and subsequent cases was, if anything, dysfunctional. It sowed the seed of the pro-choice side's later difficulties. Arguably, the prospects for the widespread availability of abortion would be better now had *Roe* never occurred. Prior to *Roe*, 18 states, some with little fanfare, had either repealed their abortion laws or loosened their restrictions considerably (Tatalovich 1988, 178–79). This

[8] In my judgment, Rosenberg makes a strong case against concluding that *Brown* and *Roe* had a positive catalytic impact, but I think that his evidence is too selective and indirect to justify the opposite conclusion—that these decisions had little if any catalytic impact.

trend may well have continued and, in making it happen, the pro-choice side would have built grass-roots political strength. *Roe*, the argument goes, mobilized the opposition and gave it a symbolic target. This is speculation, of course, but the scenario is plausible (see Tribe 1990, 49–51, for counter-speculation).

The full effects of the Court's pro-life cheerleading which began in *Webster* remain to be seen. At this juncture, however, it appears to be having an effect. Louisiana, Pennsylvania, and Utah have responded by adopting abortion policies that more severely constrain the likelihood of women choosing abortions and other states are considering doing the same. Momentum now clearly lies with the pro-life forces who, once counted out as being hopelessly outscored, are now at first down and goal to go. How *Webster's* pro-life cheers have affected the pro-choice side is less clear. The decision seemed to galvanize its forces on an immediate basis and one state, Florida, dramatically rejected the option of tougher abortion requirements. But it is not certain whether this activity is being sustained and developing into permanent and fervent grass-roots activism.

Many believe the Civil Rights movement of the 1960s and its role in winning passage of the 1964 Civil Rights Act, the 1965 Voting Rights Act, the 1968 Fair Housing Act, and other federal antidiscrimination actions were an indirect result of *Brown* (e.g., Wasby et al. 1977, 5; Kluger 1976, 749; Woodward 1974, 139; Pritchett 1964, 869). As already noted, Rosenberg (1991) challenges the conventional wisdom about this. He argues that the momentum from the already existing civil rights organizations, black economic and political pressures, and other events and philosophies more inspirational to blacks were primarily responsible for the movement and its political successes. *Brown*, he implies, happened at the right time to make causality seem plausible, but at best it made a minor contribution to achieving later desegregation policies.

Determining cause and effect broadly across space and time by looking at chains of individual inspirational processes is just about the most formidable task a social scientist can undertake. Of necessity, direct data are collected in a hit-and-miss style and surrogate data pose problems of validity. Conclusions can vary depending on how the investigation proceeds. In my view, Rosenberg (1991) underrates *Brown's* effects. The infrequency with which *Brown* might be mentioned in later magazine articles, Congressional debate, or by sit-in participants does not necessarily mean that the case was without practical or inspirational impact. I recall from living in the South in the 1950s that *Brown* pushed the question of racial equality to first place in the region's political agenda. It raised the issue a few notches on the national agenda as well.

Brown was a red flag to segregationists and, as with *Roe*, it mobilized their forces quickly. This can be seen in the immediate popularity of militantly

segregationist groups such as the White Citizens' Councils, drastic new antidesegregation legislation in the South (Murphy 1959), and the many gubernatorial races in the late 1950s and early 1960s where the determinative factor was which candidate could "out seg" the other. Unlike the *Roe* situation, however, the segregationists' inspiration from judicial defeat was of short duration; devotion to the principle of segregation all but disappeared within a generation.[9] What explains the segregationists' demise? To some extent, it can be attributed to multiple judicial defeats combined with partly Court-inspired desegregation laws and policies. But nonjudicial reasons were also present. Raw racial discrimination is not a morally attractive policy to those not already steeped in it, so hard-line segregationists found little support outside the South and diminishing support within the region among a rising generation. Economic considerations also played a role; shutting down the public schools is hardly a good way to attract new industry. These other reasons may have been more telling than the Court's booing and hissing, but I believe that without the unanimity and steadfastness accompanying the Court's desegregation decisions, resistance would have been stronger and lasted longer.

Brown's symbolic importance to blacks is less clear. As Rosenberg argues, it probably did not inspire the mid-1950s bus boycotts in Montgomery and other cities, but *Brown* could well have increased a sense of rightness among the participants. However, black mobilization did not hit high gear until the sit-ins and freedom rides began in 1960 and 1961. Four years of sit-ins and other demonstrations built the pressures necessary for passage of the 1964 Civil Rights Act. Although Title II of the act desegregating public accommodations is little litigated or discussed today, it was the primary focus in the battle over the act's passage. Thus, an important question is: to what extent did *Brown* inspire the sit-inners? In speculating about this, it helps to turn the question around and ask: would the sit-ins have occurred, or would they have been as successful, if Linda Brown had lost her case in 1954? I lean toward an answer of no. The Supreme Court may not be able to stem the tides of constitutional development, but, unlike powerless King Canute, the Court can delay them (e.g., *Lochner v. New York* [198 U.S. 45, 1905] postponed wages and hours regulation for 32 years; *Hammer v. Dagenhart* [247 U.S. 251, 1917] put off child labor laws for 21 years). Time and tide do wait upon the Supreme Court—for awhile. A victory for Topeka's Board of Education probably would not have discouraged black activists and their allies for very long, but such an event would have continued their focus on overturning the "separate but equal" doctrine. Continued attention to this would have constrained inspiration to move to new legal arenas or popular

[9] I am not saying, of course, that racism disappeared, but that overt support for the principle of segregation did.

pressures. Had Linda Brown lost, public policies concerning racial equality might not be greatly different in the 1990s, but during the 1960s, such policies would have in all likelihood been considerably different.

V

What lessons can we draw from this brief examination of the Supreme Court's involvement in these two great politico-moral clashes? To begin, I believe, based upon the evidence and speculation just discussed, that the Supreme Court was a more effective cheerleader for desegregation than it was for abortion rights. Working from this assumption, I offer some initial hypotheses about the role of the Court as a cheerleader in politico-moral disputes. Before doing so, I reiterate that I have focused on only two of the several politico-moral disputes which have occurred in our national history and involved the Court to some degree. The others await examination and integration. Thus, these hypotheses must indeed be tentative.

First, the Court can place a politico-moral issue on the national front burner. Of course, the issue must already be simmering on a rear burner. But as noted earlier, there is a natural tendency on the part of most politicians to keep politico-moral clashes muted. However, the justices have fewer needs or pressures in this direction and will sometimes choose to bring a politico-moral issue to the fore—as they did for both abortion and desegregation. Such a choice implies that the Court has a preferred outcome and reason to believe that its actions will be a successful influence in achieving that outcome. Because it has a preference and because influencing people about politico-moral issues requires considerable persuasion, judicial cheerleading is almost certain to occur when the Court moves a politico-moral issue to the top of the national agenda.[10]

Second, positive cheerleading is more effective when it is done on behalf of the side that is working to accomplish change. After *Brown* segregation still existed; the decision offered its opponents the requisite legal hope, but it did not offer the skills and energy necessary to dismantle segregated institutions. Accomplishing this depended upon motivating others and the Court, overcoming an initial caution, began cheerleading for this. By contrast, *Roe* in itself soon assured a reasonably wide availability of abortion; achieving this did not require dismantling elaborate institutions or overcoming intense cultural traditions. Thus, pro-choice groups had no important

[10] *Dred Scott* (*Scott v. Sandford*, 19 How. 393, 1857) was a judicial attempt to bring the long-simmering controversy over slavery to a pro-slavery resolution. It turned out disastrously because the Court greatly overestimated its ability to persuade northerners to accept judicial intervention and underestimated the symbolic power of its decision to mobilize abolitionist strength. The Republican victory in 1860, it can be argued, stemmed in part from the adverse reaction in the northern states to *Dred Scott* which had cheered slavery into an immediate and unavoidable political issue.

positive goals remaining; mobilization was not necessary. As a cheerleader, the Court is more suited to giving hope than to reinforcing success.[11]

Third, negative cheerleading has, if anything, the opposite effect from that intended. Judicial boos and hisses arouse and mobilize a morally motivated opposition rather than frighten or shame it into submission. Neither a major constitutional defeat nor a tongue lashing from the nation's highest court can compel or convince such forces to abandon either their principles or the conflict. Where compromise is not permissible, to accept defeat is to abandon all. This contrasts with economic or civil liberties policy issues where the losing side usually learns to live with judicial defeat (e.g., following *NLRB v. Jones-Laughlin Steel Corp.*, 301 U.S. 1, 1937, and *Miranda v. Arizona*, 384 U.S. 436, 1966). While cheerleading is part of the Court's educational function, its persuasive utility is limited when the Court speaks to parties defeated in a politico-moral battle fought in the judicial arena.

Fourth, when the Court intervenes in a politico-moral dispute, its cheerleading must be effective within a decade or so if it is to obtain its preferred resolution. Otherwise enough new justices are likely to be appointed to neutralize the Court's commitment and perhaps point it across the field. This is because, as the preceding hypothesis states, the losing side will persist and make every effort to prevail through the political process. Unless the Court's cheers can arouse sufficient numbers of the uncommitted to win public support and favorable political action, the losing side's persistence will reap political rewards. The Court's ability to achieve its goals this rapidly can depend upon the contours of the politico-moral division. *Brown* may have been a successful catalyst to desegregation because its staunchest opponents were regionally isolated whereas *Roe*'s opponents are geographically widespread. To the extent that regionality affects its success, the Court's future cheerleading will be more problematic now that the nation is becoming more homogeneous.

[11] The Court's broad rhetoric in the School Prayer cases (*Engel v. Vitale*, 370 U.S. 421, 1962, and *Abington School District v. Schempp*, 374 U.S. 203, 1963) gave heart and legitimacy to the strict separationists. This was important because their forces were quite unequal to those of the accommodationists in both numbers and respectability. Many separationists mobilized because both official resistance and tradition maintained prayers or other religious exercises in public schools (Dolbeare and Hammond 1971; Johnson 1967; Muir 1967). In one sense, however, the separationists were in the same position as the pro-choice forces following *Roe:* they had scored big and needed to protect their gain. Accommodationist forces, although less organized, were powerful when aroused. On three occasions across 20 years, a proposed constitutional amendment to permit prayers in schools failed only narrowly to achieve the necessary two-thirds majority in Congress. More recently, accommodationists have shifted strategy, arguing for silent prayer rather than prayers chosen by the state or its teachers. This may speak to the educational impact of the Court's cheerleading in *Vitale* and other cases. But it may also speak to the interest of new justices, who were appointed by presidents influenced by accommodationist political support, in this option. See *Wallace v. Jaffree* (472 U.S. 38, 1985) where a majority indicated that a period of silence would be acceptable under certain circumstances.

If these hypotheses are borne out, the Supreme Court appears to have a rather limited ability to guide politico-moral disputes to consensus or resolution. It can, of course, propel them to a front place on the national agenda, but doing so may well be dysfunctional to the justices' preferred outcome. Politico-moral clashes by their very nature are largely immune to judicial claims of authority or legitimacy. Such disputes are better and more naturally resolved through consensus or at least by legislative majorities. Certainly politico-moral disputes will continue to occur. And most of them will generate legal or constitutional questions which the Supreme Court will sometimes have to decide. The Court cannot abandon its decisional function, but because of its limited impact in settling politico-moral clashes, it must decide cases and lead cheers in such cases with patience and care.

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